2005

State of Utah v. Robert Sherry : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	**Case No. 20050522-CA**
v.	:	
ROBERT SHERRY,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM CONVICTIONS FOR POSSESSION OF METHAMPHETAMINE WITH INTENT TO DISTRIBUTE, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-37-8 (West 2004), AND POSSESSION OF DRUG PARAPHERNALIA, A CLASS A MISDEMEANOR, IN VIOLATION OF UTAH CODE ANN. § 58-37a-5 (West 2004), IN THE FIFTH JUDICIAL DISTRICT COURT, IRON COUNTY, THE HONORABLE J. PHILIP EVES PRESIDING

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

Defendant appeals his convictions for possession of methamphetamine with intent to distribute, a first degree felony, and possession of drug paraphernalia, a class A misdemeanor. This Court has jurisdiction pursuant to § 78-2a-3(2)(j) (West 2004) (pour-over provision).

ISSUE ON APPEAL AND STANDARD OF REVIEW

Did the prosecutor's brief reference to suppression issues during closing argument warrant a mistrial where curative instructions and strong evidence of defendant's guilt rendered the reference harmless?

"'Because a trial court is in the best position to determine an alleged error's impact on the proceedings, [this Court] will not reverse a trial court's denial of a mistrial motion based on prosecutorial misconduct absent an abuse of discretion.'" *State v. Pritchett*, 2003 UT 24, ¶ 10, 69 P.3d 1278 (quoting *State v. Harmon*, 956 P.2d 262, 276 (Utah 1998)).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

No constitutional provisions, statutes, and rules are relevant to this appeal.

STATEMENT OF THE CASE

Defendant was originally charged by information with possession of methamphetamine with intent to distribute, a first degree felony; possession of methamphetamine, a first degree felony; possession of marijuana, a third degree felony; possession of drug paraphernalia, a class A misdemeanor; driving without insurance, a class B misdemeanor; and driving on a suspended license, a class B misdemeanor (R2-4). After a preliminary hearing, defendant was bound over on all of the possession charges (R25).

Before trial, defendant filed a motion to suppress evidence found in his vehicle and evidence found in a subsequent search of his home (R67-72,92-94). The State opposed defendant's motion (R78-87). Following an evidentiary hearing, the trial court denied defendant's motion as to evidence found in his vehicle but granted his motion as to evidence found in his residence (R100-01,105-07).

Based on the trial court's ruling, the State filed an amended information charging defendant with possession of methamphetamine with intent to distribute, a first degree felony, and possession of drug paraphernalia, a class A misdemeanor (R122-23). A jury trial followed. Defendant moved for a mistrial after closing argument, alleging prosecutorial misconduct in the State's closing argument (R204:183). After the trial court

denied defendant's motion, the jury convicted defendant as charged (R124-28,171-72,192-95; R204:189). Defendant was sentenced to five-years-to-life in prison on his first degree felony conviction; his sentence on his misdemeanor conviction was stayed (R192-95).

Defendant timely appealed (R187-88). The supreme court transferred the matter to this Court for disposition.

STATEMENT OF FACTS

The evidence. On June 25, 2004, a police officer stopped the truck defendant was driving because it lacked a license plate (R204:59-60). When approached by the officer, defendant acknowledged that the unregistered truck was his and that he did not have a driver's license (R204:61). A subsequent record check confirmed that defendant's driver's license had been suspended (R240:61). The check provided no information on the registration of the vehicle (R240:61).

Based on the registration and license violations, defendant was arrested and his vehicle searched in preparation for its impound (R204:62,68). The search revealed an uncovered speaker hole in the driver's door (R204:68). Inside the hole, in a cloth bag, were 51 grams of fresh methamphetamine, a scale, and several small plastic baggies (R204:68,70-71). Although the truck was "filthy dirty," the cloth bag showed no signs of accumulated dirt or dust (R204:72,74,125,146).

Sergeant Keith Millett, who leads the Iron/Garfield County Narcotics Task Force, testified that 51 grams of methamphetamine has a street value of over $5,000

(R204:90,93). "[I]t's very valuable to a person that's dealing—dealing the substance. It's like cash. They're gonna actually keep it close b[y]. . . . They're not gonna arbitrarily leave it out for someone else to pick up or lose or be taken" (R204:96).

In his defense, defendant called one witness, a self-employed auto mechanic and close family friend named Nelson S. Gallaagr (R204:131,133,145). Gallaagr testified that, about two weeks before defendant's arrest, defendant asked him to work on defendant's truck, a Chevy pickup that was not running (R204:133). At the time, the truck sat unlocked in a parking lot owned by a small local company named Agrinautics (R204:134). Gallaagr thought about 12 people worked at the company (R204:134). However, the parking lot was next to Airport Road, which got a lot of traffic (R204:136).

Gallaagr could tell that the truck had been sitting in the lot "for a year or two" because the engine "was all fuzzy just from the dirt, just from the desert and all that stuff" and because "rats had a nest in the air breather" (R204:135). Gallaagr and defendant used a forklift to pull out the engine. They took the engine to Gallaagr's shop, where he worked on it for about a week and a half (R204:135,137,144).

After Gallaagr rebuilt the engine, he and defendant put it back into the truck (R204:138). Defendant drove the truck away that day (R204:138). Defendant returned the next day because the truck "did not have power breaks" and because "the carburetor wasn't workin' right because it set so long" (R204:138). Defendant left again after those repairs were done (R204:138). He was arrested about an hour later (R204:138).

Gallaagr did not know how the truck ended up in the Agrinautics parking lot or how defendant had come to own it (R204:140,146). He had been in the truck while working on it (R204:141). He never saw any drugs in the door (R204:142). "All [he] saw was a filthy dirty truck" (R204:146). Gallaagr stated, however, that he "never had a reason to even look in the door" (R204:142). He explained that his "main part was under the hood" (R204:142). Gallaagr did not put the drugs in the car door, nor were the drugs his (R204:143).

Neither the bag nor its contents were analyzed for fingerprints (R204:86-87).

Opening statements. In his opening statement, the prosecutor summarized the evidence he planned to present. The prosecutor stated that the evidence would show that defendant was arrested after having been stopped by police for driving in an unregistered truck. A subsequent search of the truck revealed a large quantity of methamphetamine in a hole in the driver's side door, together with a small scale and small baggies. Defendant was the driver and sole occupant of the truck at the time (R204:52-54).

In his opening statement, defense counsel acknowledged that drugs had been found in the vehicle he had been driving. Counsel asserted, however, that "[t]he problem is that . . . the State has the burden of establishing a nexus between, ah, Mr. Sherry and the drugs" (R204:55). Counsel asserted that the State would not be able to meet that burden where "the truck wasn't registered," "[i]t hadn't ran for years," and "it's been parked out in—in a business for years" (R205:55). Moreover, "there's no—no indication of fingerprints or any other sort of type of evidence that would indicate that [defendant]

. . . had knowledge about these in these drugs" (R204:57). Rather, "the evidence is going to indicate that Mr. Sherry had no idea the[drugs] were in there" (R204:56).

Closing argument.[1] In closing argument, the prosecutor reviewed the elements instructions for the two crimes as they related to the evidence (R204:154-58). He then addressed the reasonable doubt instruction and whether reasonable doubt had been raised in this case (R204:158-62). The prosecutor noted that, although he presented no fingerprint evidence, "[w]e have had a little talk about fingerprints and why the law enforcement didn't get fingerprints" (R204:160). The prosecutor also noted evidence "that the truck was dirty—very dirty inside" and "[y]et this bag, which . . . is in substantially the same condition it was in at the time it was taken from the truck . . . looks pretty clean" (R204:161). Thus, "this evidence hadn't sat in that truck, you know, for a long extended period of time" (R204:161).

In his closing, defense counsel focused on his contention that the evidence raised a reasonable doubt concerning whether defendant had possessed the drugs and paraphernalia found in his truck. Counsel noted that the truck wasn't registered at the time police stopped it; it hadn't been insured since 1999; it hadn't been running for a long time; it had sat for at least some period of time in a company parking lot; it had not been locked because there was no key to unlock it; it was then worked on by a mechanic for some two weeks; shortly after defendant drove it away, he returned it for more repairs; and defendant was arrested shortly after retrieving the truck once those repairs were

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[1]The transcript of closing arguments is attached at Addendum A.

completed (R204:169-70). Counsel then focused on the lack of fingerprint evidence (R204:172). He concluded that, "when you have a situation like we have here," where "the State has not established in any manner exclusive control" by defendant and where "we don't have any fingerprints to prove or establish that he touched this or ever had control of it, I don't think the State has met its burden of proof beyond a reasonable doubt" (R204:174-75).

In his rebuttal, the prosecutor addressed the various arguments defendant had presented (R204:175-80). The prosecutor then referred to the suppression hearing that had taken place before trial (R204:180): "Sometimes juries get—they get caught up in, ah, suppression issues and things like that when they get back to deliberate. I just want to tell you that—that those issues, ah, have already been resolved in this case. In other words,—" (R204:180-81).

Defendant objected to the prosecutor's comment as "inappropriate" (R204:181). The trial court agreed, stating that "[t]here's no evidence in the record regarding that the jury can consider" (R204:181). The prosecutor explained his comment:

> Okay. My point is that when you get back to deliberate, ah, you're not to consider search and seizure issues or whether or not the search was lawful that was performed by Detective Gower. That your law, as it's contained in those instructions, 1 through 24, that's where you're to find your law and your instructions. And anything outside of that, ah, is not to be considered by—by the jury, together in your deliberations. That is where your law is contained.

(R204:181). Defendant did not object to the prosecutor's explanation (R204:181).

After once more directing the jury "to your jury instructions" to answer any "questions about anything, you know, regarding this case, as far as the law goes," the prosecutor concluded by asking the jury to convict defendant on both charges (R204:181-82).

Jury instructions.[2] After closing argument, the jury received its final instructions. Instruction 2 directed the jury that "[y]ou are to be governed in this case by the evidence presented to you and the law as I state it to you," and that "[y]ou may not consider . . . guesswork . . . in deciding the guilt or innocence of the defendant" (R169; Jury Inst. 2).

Instruction 3 instructed the jury that they "may not consider evidence which is excluded" or "consider as evidence statements of the attorneys" (R168; Jury. Inst. 3). The same instruction then reiterated that counsels' statements were not to be considered evidence:

> Statements, arguments and remarks of the attorneys are intended to help you understand the evidence and apply the law, but such statements are not evidence. You should disregard any statement of any attorney which has no basis in the evidence coming from witnesses, documents or stipulations received in evidence in this case.

(R168; Jury Inst. 3).

Defendant's mistrial motion.[3] After the jury was excused to deliberate, defendant moved for a mistrial (R204:183). Defendant argued that the prosecutor's

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[2]Copies of instructions 2 and 3 are attached at Addendum B.

[3]The transcript of argument on defendant's mistrial motion is attached at Addendum C.

reference to suppression issues in rebuttal was "prosecutorial misconduct" because "[i]t has nothing to do with any defense that we presented and does nothing more than try and tell the jury that there's evidence out there that he wasn't able to present" (R204:183). The trial court denied defendant's motion:

> I didn't hear anything in the comment that would have inferred to the jury that there was other evidence that they weren't told about. Ah, so I don't view that as the purpose of the statement. On the other hand[,] I don't think that's appropriate for the prosecutor [to] tell the jury about prior proceedings that aren't in the—aren't in the evidence. And, so I find that I think that it was inappropriate to make that comment that those issues had already been dealt with. On the other hand, I don't think it rises to the level that requires a mistrial, so I'm gonna deny the motion for a mistrial.

(R204:189).

SUMMARY OF THE ARGUMENT

Defendant argues that the trial court abused its discretion by denying his mistrial motion. Defendant claims that a mistrial was warranted because the prosecutor's reference to "suppression issues" during closing argument implied that other evidence existed to support defendant's guilt. Defendant's claim lacks merit.

To establish prosecutorial misconduct, defendant must show both that the prosecutor improperly referred the jury to matters not proper for its consideration and that the comments significantly influenced the jury's verdict.

Here, even assuming that the prosecutor's comment was improper, defendant cannot show that he was prejudiced by it. First, in context, the prosecutor's comment did not imply that other evidence of defendant's guilt existed. Second, the jury received

numerous curative instructions following the prosecutor's comment. Third, the evidence against defendant was strong.

ARGUMENT

THE PROSECUTOR'S BRIEF REFERENCE TO SUPPRESSION ISSUES DURING CLOSING ARGUMENT DID NOT WARRANT A MISTRIAL WHERE CURATIVE INSTRUCTIONS AND STRONG EVIDENCE OF DEFENDANT'S GUILT RENDERED THE REFERENCE HARMLESS

Defendant claims that the trial court abused its discretion by denying his motion for a mistrial. Defendant claims that "[t]he prosecutor's inappropriate statements [addressing suppression issues] tainted the trial with the information that there existed other incriminating evidence which had been suppressed and thus which the jury was not allowed to hear, thus depriving the Defendant of his right to a fair trial." Aplt. Br. at 5. Defendant's claim fails where he was not prejudiced by the prosecutor's comments, even if those comments were improper.

"'Because a trial court is in the best position to determine an alleged error's impact on the proceedings, [this Court] will not reverse a trial court's denial of a mistrial motion based on prosecutorial misconduct absent an abuse of discretion.'" *State v. Pritchett*, 2003 UT 24, ¶ 10, 69 P.3d 1278 (quoting *State v. Harmon,* 956 P.2d 262, 276 (Utah 1998). "'This standard is met only if the error is substantial and prejudicial such that there is a reasonable likelihood that in its absence, there would have been a more favorable result for the defendant.'" *Id.* (quoting *Harmon,* 956 P.2d at 276) (additional citations and quotation marks omitted).

I. General law governing prosecutorial misconduct claims.

To establish prosecutorial misconduct, defendant must show that "'the prosecutor's comments call[ed] the jurors' attention to matters not proper for their consideration and [that] the comments have a reasonable likelihood of prejudicing the jury by significantly influencing its verdict.'" *State v. Jimenez*, 2001 UT App 68, ¶ 15, 21 P.3d 1142 (quoting *State v. Reed*, 2000 UT 68, ¶ 18, 8 P.3d 1025) (additional citation and internal quotation marks omitted), *cert. denied*, 29 P.3d 1 (Utah 2001). "'In determining whether a given statement constitutes prosecutorial misconduct, the statement must be viewed in light of the totality of the evidence presented at trial.'" *State v. Longshaw*, 961 P.2d 925, 927 (Utah App. 1998) (quoting *State v. Cummins*, 839 P.2d 848, 852 (Utah App. 1992)).

Against that backdrop, the law is well-established that a prosecutor may not refer to previously excluded evidence during closing argument. *See, e.g.*, *People v. Crew*, 74 P.3d 820, 839 (Cal. 2003) (holding that it is improper "for a prosecutor to make remarks in . . . closing arguments that refer to evidence determined to be inadmissible in a previous ruling of the trial court"), *cert. denied*, 541 U.S. 991 (2004); *People v. Mullen*, 566 N.E.2d 222, 227 (Ill. 1990) (holding that "it is improper to refer to evidence which has been excluded" during closing argument); *Ture v. State*, 681 N.W.2d 9, 19 (Minn. 2004) (holding that prosecutor's reference in closing argument to evidence ruled inadmissible was improper); *State v. Williams*, 119 S.W.3d 674, 680 (Mo. App. 2003)

(holding that prosecutor commits error by commenting on or referring to excluded evidence).

The law is also well-established that a prosecutor may not use a defendant's invocation of his constitutional rights against him during closing argument. *See, e.g.*, *State v. Harmon*, 956 P.2d 262, 266 (Utah 1998) (citing *Doyle v. Ohio*, 426 U.S. 610, 619 (1976), for proposition that "use of post-*Miranda* silence for impeachment purposes violates Due Process Clause of Fourteenth Amendment").

However, a prosecutor's brief reference to a defendant's invocation of his constitutional rights does not constitute prosecutorial misconduct unless the State, "in some way, use[s] the defendant's [invocation] to undermine the exercise of those rights." *Harmon*, 956 P.2d at 268. In other words, a new trial is warranted only "[i]f the error is substantial and prejudicial to the extent that there is a reasonable probability that it affected the reliability of the trial outcome." *Id.* This rule also attains when the prosecutor only briefly references suppression matters. *See, e.g.*, *People v. Chavez*, 762 N.E.2d 553, 564 (Ill. App. Ct. 2001) (holding that prosecutor's improper comment on suppressed evidence in closing argument was harmless where evidence of guilt was overwhelming), *appeal den.*, 770 N.E.2d 221 (Ill. 2002); *People v. Stein*, 366 N.E.2d 629, 636 (Ill. App. Ct. 1977) (holding that two references to suppression motion during questioning of witness were not prejudicial where prosecutor did not "specifically state[] to what the motion to suppress referred [or] specifically [tell] the jury that the court had denied defendant's motion to suppress"); *People v. Smith*, 350 N.E.2d 791, 793 (Ill. App.

Ct. 1976) (finding no prejudice where, after prosecutor mentioned suppression hearing during cross-examination of defendant, trial court sustained defendant's objection); *State v. McNeil*, 658 N.W.2d 228, 232-33 (Minn. App. 2003) (holding that prosecutor's misconduct in eliciting suppressed evidence on multiple occasions was harmless where evidence of guilt was overwhelming); *People v. Rivera*, 530 N.Y.S.2d 269, 269 (App. Div. 1988) (holding that prosecutor's improper comment on suppressed evidence was harmless where "any possible prejudice . . . was cured by the court's prompt curative instruction and jury charge, which informed the jury that statements of the attorneys did not constitute evidence"); *United States v. Grubbs*, 776 F.2d 1281, 1288-89 & n.4 (5th Cir. 1985) (holding that prosecutor's improper comment on suppression hearing and suppressed evidence was "unlikely" to lead jury "astray" and thus "did not have the requisite detrimental effect on the jury's ability to judge the evidence fairly" to rise to level of plain error) (citations and internal quotation marks omitted).[4]

Finally, this Court need not decide whether a prosecutor's comments were improper if defendant cannot show that he was prejudiced by them. *See State v. Adams*,

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[4]Citing *State v. Genovesi*, 909 P.2d 916 (Utah App. 1995), defendant asks this Court to require a showing that the prosecutor's comment was harmless beyond a reasonable doubt before this Court upholds the trial court's mistrial ruling. *See* Aplt. Br. at 4. *Genovesi*, however, involved "the admission of evidence seized in violation of the Fourth Amendment" to prove the defendant's guilt. *Genovesi*, 909 P.2d at 922. This case does not involve the admission of excluded evidence. Thus, the constitutional harmlessness analysis does not apply. *See Harmon*, 956 P.2d at 269 (applying general harmlessness analysis to prosecutor's inadvertent reference to defendant's invocation of right to silence).

955 P.2d 781, 786 (Utah App. 1998) ("We do not address whether the prosecutor's comments constituted error because we find no evidence of prejudice."), *aff'd*, 2002 UT 42, 5 P.3d 642.

II. Analysis

Here, the trial court deemed the prosecutor's statement improper. Assuming, but not conceding the correctness of that ruling, defendant has not shown that he was prejudiced by it. *See Adams*, 955 P.2d at 786.

First, the prosecutor's comment did not "specifically state[] to what the motion to suppress referred [or] specifically [tell] the jury that the court had denied defendant's motion to suppress." *Stein*, 366 N.E.2d at 636 (holding that two references to suppression motion during questioning of witness were not prejudicial where prosecutor's reference to suppression motion was inadvertent). Indeed, it was so vague as to not tell the jury much of anything.

Moreover, in explaining his comment, the prosecutor directed the jury's attention away from any inference that additional evidence existed when he specifically asked the jury not to consider the legality of the search of defendant's car (R204:181 (directing the jury not to consider "whether or not the search was lawful that was performed by Detective Gower")). By explaining that his comment concerned the jury's possible consideration of the legality of that search, the prosecutor dispelled any inference that his comment referred to any other search or evidence.

Thus, the trial court correctly found that nothing "in the comment . . . would have [implied] to the jury that there was other evidence that they weren't told about" (R204:183). *See Harmon*, 956 P.2d at 268 (holding that brief reference to a defendant's invocation of right to silence does not constitute prosecutorial misconduct unless the State, "in some way, use[s] the defendant's [invocation] to undermine the exercise of those rights guaranteed by the Fourteenth Amendment").

Second, although the trial court did not give an immediate curative instruction after sustaining defendant's objection, the prosecutor essentially did when, without objection, he explained to the jury that his point was only "that when you get back to deliberate, . . . you're not to consider search and seizure issues," that the governing law was "your instructions," and that "anything outside of that, ah, is not to be considered" (R204:181-82).

The jury received additional curative instructions in its general jury instructions. Instruction 2 directed the jury that "[y]ou are to be governed in this case by the evidence presented to you and the law as I state it to you," and that "[y]ou may not consider . . . guesswork . . . in deciding the guilt or innocence of the defendant" (R169; Jury Inst. 2).

Instruction 3 instructed the jury both that they "may not consider evidence which is excluded" and that "you may not consider as evidence statements of the attorneys" (R168; Jury. Inst. 3). The same instruction then reiterated that counsels' statements were not to be considered evidence:

> Statements, arguments and remarks of the attorneys are intended to help you understand the evidence and apply the law, but such statements are not evidence. You should disregard any statement of any attorney which has no basis in the evidence coming from witnesses, documents or stipulations received in evidence in this case.

(R168; Jury Inst. 3). *See State v. Kohl*, 2000 UT 35, ¶ 24, 999 P.2d 7 (rejecting prosecutorial misconduct claim where trial court gave immediate curative instruction and then additional curative instruction in overall jury instructions, concluding that "[d]efendant has not shown, as is his burden, that the comment was so prejudicial as to defeat the mitigating effect of the court's two curative instructions"); *see also Longshaw*, 961 P.2d at 929-30 (holding that instruction directing jury to be governed by jury instructions was sufficient to cure prosecutor's misstatement of law in closing argument; citing cases). *Cf. Harmon*, 956 P.2d at 271 (noting that "curative instructions are a settled and necessary feature of our judicial process and one of the most important tools by which a court may remedy errors at trial").

Finally, the evidence against defendant was strong. Fifty-one grams of methamphetamine was found in a dirt-free bag in a hole in the driver's door of a very dirty truck in which defendant, the driver and owner, was the sole occupant (R204:61,68,70-72,74,93,125). The meth had a street value of over $5,000 (R204:93). It was therefore "very valuable to a person that's . . . dealing the substance" and something its owner was "gonna actually keep . . . close b[y]" (R204:96). Where "the evidence of [defendant's] guilt was strong," this Court "will not presume the prosecutor's [comments]

were prejudicial, especially in light of the [subsequent] curative admonition to the jury." *Longshaw*, 961 P.2d at 931; *see also State v. Baker*, 963 P.2d 801, 805 (Utah App. 1998) (rejecting prosecutorial misconduct claim where, "even if there was error," "the evidence against defendant . . . was considerable"; citing cases).

In sum, given the limited nature of the prosecutor's reference, the curative instructions that followed, and the strength of the evidence establishing defendant's guilt, defendant was not prejudiced by the prosecutor's comment, even if that comment was improper. The trial court, therefore, did not err in denying defendant's mistrial motion.

Defendant's cases do not alter that result. Both *State v. Genovesi*, 909 P.2d 916, 920-21 (Utah App. 1995), and *Walton v. State*, 431 S.W.2d 462, 467 (Ark. 1968), *see* Aplt. Br. at 4, 7, involve the trial court's erroneous denial of a defendant's motion to suppress evidence that was then admitted at trial. In both cases, therefore, the determinative issue was whether the defendant was prejudiced by the jury's knowledge of specific evidence that should have been suppressed. *See Genovesi*, 909 P.2d at 921-22; *Walton*, 431 S.W.2d at 467. By contrast, in this case, the prosecutor never identified the evidence that was the subject of defendant's suppression motion, let alone presented that evidence to the jury (R204:180-81). Thus, *Genovesi* and *Walton* are inapposite.

Along the same line, *Robinson v. State*, 623 S.W.2d 534, 535-36 (Ark. App. 1981), involved the prosecutor's reference to specific evidence that had been suppressed before trial. *See* Aplt. Br. at 4, 7. *State v. Morant*, 574 A.2d 502, 510 (N.J. Super. App. Div. 1990), involved the use of suppressed evidence by one co-defendant against another. *See*

Aplt. Br. at 6. As in *Genovesi* and *Walton*, the issue in those cases was whether the defendant was prejudiced by the reference to or use of specific evidence that should have been excluded. *See Robinson*, 623 S.W.2d at 536; *Morant*, 574 A.2d at 510. Because the prosecutor here never identified the evidence suppressed by defendant's motion, *Robinson* and *Morant*, like *Genovesi* and *Walton*, are distinguishable.

Nelson v. State, 513 S.W.2d 496 (Ark. 1974), does not address inadmissible evidence improperly referenced at trial. *See* Aplt. Br. at 4, 7. Thus, *Nelson* does not involve any of the issues raised by defendant's brief. *Nelson*, 513 S.W.2d at 498-501.[5]

The most applicable case cited by defendant is *State v. Harmon*, 956 P.2d 262 (Utah 1998). In that case, Harmon challenged the trial court's denial of his motion for mistrial after the prosecutor inadvertently elicited suppressed evidence that defendant had invoked his right to silence. *Id.* at 266-67. The supreme court affirmed the trial court's ruling where the State's eliciting the evidence was inadvertent and the State had not "in some way, use[d] the defendant's silence to undermine the exercise of those rights guaranteed by the Fourteenth Amendment." *Id.* at 268. Given that "the fact of Harmon's post-arrest silence was not submitted to the jury as evidence from which it was allowed to draw any permissible inference," the court held, "the elicited statement was not prejudicial." *Id.* at 269.

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[5]Although *Nelson* is cited in *Robinson*, it appears to be cited only for the unremarkable proposition that prejudicial errors require reversal. *See Robinson*, 623 S.W.2d at 536, *Nelson*, 513 S.W.2d at 499.

Here, as in *Harmon*, the prosecutor's reference to the pre-trial suppression hearing was harmless. As previously discussed, the prosecutor never attempted to, "in some way, use the defendant's [filing of a suppression motion] to undermine the exercise of those rights guaranteed by the Fourteenth Amendment." *Harmon*, 956 P.2d at 268. Indeed, the comment was so cryptic as to not convey much of anything to the jury. Moreover, the prosecutor's comment was followed by a curative explanation and curative instructions, and the evidence against defendant was strong. Under such circumstances, the prosecutor's comment did not "'so likely influence[] the jury that the defendant cannot be said to have had a fair trial.'" *Id.* at 274-75 (quoting *State v. Robertson*, 932 P.2d 1219, 1231 (Utah 1997)).

Consequently, even if the prosecutor's comment were error, the trial court did not err in denying defendant's mistrial motion.

CONCLUSION

Based on the foregoing, the State asks this Court to affirm defendant's convictions.

RESPECTFULLY SUBMITTED 30 January 2006.

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Assistant Attorney General

CERTIFICATE OF MAILING

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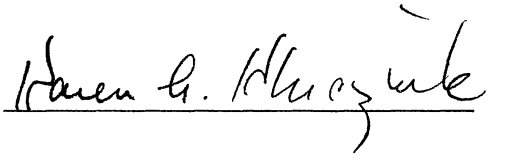

Addenda

Addendum A

IN THE FIFTH JUDICIAL DISTRICT PAROWAN COURT

IN AND FOR IRON COUNTY, STATE OF UTAH

ORIGINAL

STATE OF UTAH,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	CASE NO. 041500345
	)	
ROBERT JAMES SHERRY,	)	JURY TRIAL
	)	
Defendant,	)	
	)	

BEFORE THE HONORABLE J. PHILIP EVES

FIFTH JUDICIAL DISTRICT PAROWAN COURT

IRON COUNTY COUNTY COURTHOUSE

PAROWAN, UTAH 84761

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MARCH 3, 2005

REPORTED BY: Joseph M. Liddell, CSR, RPR

20050522-SC

(Court read Instructions No. 8 through and Including NO. 24, and verdict forms.)

THE COURT: In my hand I hold the Verdict Form of which I just spoke. There's the caption of this case (Indicated). It has the two counts listed and the two choices of verdict as to each count, guilty or not guilty.

On the second page there is a date for -- and a signature line for the Foreperson of the jury to execute so that any verdict set out on this form is certified to be the unanimous verdict of the jury. Below that there are lines for concurring jurors. All those who agree with the verdict recorded on the form should sign as a concurring juror. That means that the Foreperson, assuming he or she agrees with the verdict, would also sign and there would be eight signatures there as concurring jurors.

The verdict is simply indicated by placing an X or a check above the appropriate "yes". One of those marks as to each count.

Okay. Ready for closing arguments.

Mr. Garrett.

PLAINTIFF'S INITIAL CLOSING ARGUMENT

BY MR. GARRETT: May it please the Court, counsel, members of the jury. Just want to start off, ah, by thanking you again for your time and your service. I also want to clarify one thing. Ah, in a criminal trial like this, although the attorneys do a lot of talking, we don't actually,

ah, present, ah, or give evidence that goes on the record. The evidence was presented by the witnesses, by Commander Millett and by Agent Gower and Officer Ball. That's the evidence that -- that you're going to consider.

The things that I say is not evidence. I, myself, and Mr. Slavens, we're here to help the proceedings go along to present witnesses, ah, to ask questions, ah, to -- to help introduce the evidence into evidence, but we don't actually -- the things that we say is not evidence. Okay. The evidence came from the witnesses and this that is marked (Indicated) which you'll have a chance to take back in the Jury Room with you. That's the evidence that you're gonna consider today.

Now this is the chance for me to get up and tell what you about what I think about the law that you've been given, the Jury Instructions. And it's also a chance for me to comment on the evidence and the way that I see it. Mr. Slavens will have the same opportunity.

When I first started out, I told you that this case wasn't factually a difficult case, and it's not. Ah, it's a stop of a vehicle, a search of the vehicle, and then find drugs. That's the case. Factually, pretty -- pretty slick. I mean there wasn't a lot of witnesses today that testified. I had three and the defense had one. And there's seven items of evidence that you'll consider. So -- so factually, not -- not really a difficult case. I think what it's gonna come

down to for you jurors, when you get back in deliberation, ah, is you're gonna apply the -- the facts that you have to the law as it's been given to you, and you're gonna reach a reasonable conclusion.

That's what -- that's what I want to talk to you about is the law. I have, ah, selected two instructions I'd like you to pay close attention to. You need to pay close attention to all of them. But there's two that are the elements of the crimes.

Instruction No. 10 is the elements for Unlawful Possession Of Methamphetamine With Intent To Distribute. And Instruction No. 11 is Unlawful Possession Of Drug Paraphernalia. And in order to you to convict this defendant here today, you have to find that the State -- that I have presented enough evidence through my witnesses to meet each and every element of the crime.

And so let's just look at jury Instruction No. 10. Ah, it's the -- it's the instruction for Possession With Intent To Distribute. It states that the State must prove and you must find unanimously and beyond a reasonable doubt each and every one of the following elements.

No. 1. That the defendant acted knowingly and intentionally. Okay.

You have, also as part of your jury instructions -- I believe it's No. 12 -- is your definitions. You need to

know your definitions. To -- to, ah, read the definition on what knowingly is and what intentionally is.

Someone who acts knowingly and intentionally, it's their purpose to do what they did. In other words, it would be his purpose to possess the drugs. Okay? That would be acting knowingly and intentionally.

Element No. 2. That the defendant did possess the controlled substance methamphetamine. Here you have -- you have, ah, the STATE'S EXHIBIT NO. 2, which is methamphetamine (Indicated). It was tested by the Crime Lab. 51 grams of methamphetamine. And you'll have back there with you, too, Mr. Gerlits's report, which -- he's the one that tested the drugs. That's his signature here. And he states that in this package there is 51 grams of methamphetamine. Methamphetamine is a controlled substance and your jury instructions instruct you on that.

So you're gonna look at No. 2. Did the defendant possess the controlled substance, methamphetamine? And if you found that we have met our burden in proving that he possessed, knowingly and intentionally, methamphetamine, you can just check those off and move on down to No. 3, that the defendant possessed the methamphetamine with the intent to distribute the same. That's the -- that's the next element you've got to prove. Did he intend to possess this with the intent for distribute (Indicated)? And the evidence that you

have on that element, if you'll recall, Officer Millett testified that -- that these (Indicated) -- first of all, the quantity is substantial enough that it's a distributable amount. Anybody who has 51 grams, over $5,000 worth of methamphetamine, that's more than what they would normally use for personal consumption. So he indicated, from his experience, that that's a distributable amount. Along with that he also indicated these baggies in here are used to package the controlled substance methamphetamine (Indicated).

In his training and experience, it's very probable for him to see a larger quantity separated into smaller quantities, packaged, and then distributed that way.

So you have these little baggies in here (Indicated) and then you have these -- the scales (Indicated). And the scales, as was testified by both Commander Millett and Officer Gower, are used to weigh out the methamphetamine, and then -- and then place it into the baggies.

From that evidence you could -- you could reasonably conclude that the defendant possessed the methamphetamine with the intent to distribute.

Ah, kind of interesting when Officer Millett stated that this was like cash to people that use drugs (Indicated). Ah, this is cash. $5,000 right there. And it's interesting, because you wouldn't -- looking at this, you wouldn't think that would be $5,000 worth. It kind of looks like little

white crystals. Rock-type crystals. And you know, you wouldn't think that would be worth $5,000. But according to him, who -- he's been in this investigation of narcotics for a long time. Ah, he -- he knows what that substance sells for. $5,000.

So if you find that we've met that element, you can check it off and go on to No. 4. The fourth -- the fourth element here is that these acts occurred on or about June 25th, 2004, Iron County. You've heard evidence that Officer Ball pulled the defendant's vehicle over near the Crystal Inn on June 25th, 2004, in Cedar City, which is in Iron County, State of Utah. That's not disputed.

And so that's -- that's the first charge. Okay. And if you can check off those -- those four elements there, then -- then -- then you're saying the State has met its burden, and you can convict the defendant of Unlawful Possession Of Methamphetamine With Intent To Distribute.

The second charge is No. 11. You go through the same process. Okay?

Did the defendant act knowingly and intentionally, No. 1? No. 2. Did the defendant possess drug paraphernalia? And, ah, No. 3 kind of gives a -- a description of paraphernalia. The said drug paraphernalia was used to compound, convert, prepare, test, analyze, pack, repack, store, contain, conceal, ingest, inhale or otherwise introduce

a controlled substance into the human body. I certainly think you can infer, from the evidence that you'll be looking at that -- and I think the paraphernalia -- the scale certainly is paraphernalia used to weigh out the product. And then the little baggies used to package the methamphetamine.

And then No. 4. That these acts occurred on -- on or about June 25th, 2004. And again you can look through that. But if you can check those all off, ah, then you -- you can find the State, ah, met its burden of proof beyond a reasonable doubt. And you should convict the defendant on both counts.

If -- if you can't find that we've proved each one of those -- each and every one of those elements, then -- then you would have to dismiss the -- that particular count, if you find the State didn't meet its burden.

It is the State's burden to prove beyond a reasonable doubt, and I want to talk to you a little bit about reasonable doubt. Instruction No. 8 refers to that. And right there on the last paragraph it says proof beyond a reasonable doubt does not require proof to an absolute certainty. Proof beyond a reasonable doubt is that degree of proof which satisfies the mind convinces the understanding of those who are bound to act conscientiously upon it and obviates all reasonable doubt. So it's that degree of proof which satisfies the mind and convinces the understanding.

A reasonable group of people here. There's eight of you. Eight jurors who will go back and -- and use your experience, your knowledge -- your experience, your understanding. And together you're gonna talk about -- about these facts and you're gonna -- you're gonna reach a unanimous conclusion.

And I would just ask you to look at the facts and ask, "Does it make sense? Does it -- does it sound right what the State is alleging here?"

Ah, I think, you know, based on the facts that have been presented to you, ah, the defendant owned the truck in question. That's the evidence that you have in front of you. There's nothing to contradict that. This was the defendant's truck.

Ah, these drugs were found inside this bag (Indicated). I think it's reasonable to believe that the defendant would try and conceal an illegal item from the public view. I don't find it hard to believe at all that the drugs were hidden back in this compartment (Indicated). If you have something that is of this much value and is this illegal, you're gonna try and conceal it from law enforcement or from other people that may turn you in.

Of course, they're gonna consume it. They'll put it somewhere where it's not easy for other people to see.

Captain Millett testified again about how this is

like cash to those, ah -- those that deal in drugs (Indicated).

Who, in their right mind -- and would any of you leave $5,000 somewhere unattended or not know where it -- where it was?

Would you just leave $5,000 somewhere? You know, probably not. That's a lot of money to you. It's a lot of mine to me. It's a lot of money to anybody.

I would know where my -- where my money was, if it was $5,000, and I wouldn't leave it in a place, ah, where I didn't know I could leave it there or unattended.

Ah, he testified that -- that people that are involved in the drug trade, they like to keep the drug close to 'em; know where it is. Around their person. Well, how much closer can you get than where it was from the defendant? It was right next to him. He was driving the truck. Got his drugs hidden there in the compartment where nobody can see 'em. He knows where it's at. $5,000. You know, he knew. He knew the drugs were there and he knew they were his and he knew what he was doing.

We have had a little talk about fingerprints and why the law enforcement didn't get fingerprints. Well, maybe the perfect world, you know, all the evidence would be there and -- and they would be able to draw fingerprints off of every little -- little item. Unfortunately we don't live in

the world of -- of the CSI television shows that you see. Commander Millett testified it's oftentimes difficult to pull fingerprints. There's many cases that he's worked where he hasn't been able to get prints. And there's more than a couple of cases, of the hundreds, where he had prints that -- that actually solved the case.

You know, it's pretty strong evidence that -- that it was his truck. The drugs were right next to him, right there in his truck. That's possession. To me that's possession. I don't -- I don't see how you can argue anything else.

Ah, they were in his possession in his truck. It's a lot of money. He knew they were there. He was protecting them. He had them hidden away.

You heard testimony from their witness that the truck was dirty -- very dirty inside. Yet this bag, which Officer Gower testified is in substantially the same condition it was in at the time it was taken from the truck. It looks pretty clean to me, as well as the scales and the baggies that are in there.

Ah, it hadn't sat there. This -- this evidence hadn't sat in that truck, you know, for a long extended period of time. Ah, it was -- it was being taken in and out of the truck. I would say, based on the cleanness of the bag and the cleanness of the scales, you know, it just didn't sit there

for a long time. I mean it wasn't like somebody left these drugs in there and then forgot about it. Based on the evidence that I see, reasonable to infer that somebody was taking those drugs in and out of that compartment. And who was in a better position to do that than the owner of the vehicle?

And so, you know, you'll get the chance to go back and sift through all this evidence and -- and read your jury instructions and talk about it amongst yourselves, and, ah, find a way to reach a conclusion.

I told you at the beginning of -- of the trial that I was gonna come back and ask you to convict the defendant, and I'm going to. I'm gonna ask you to convict him of unlawful -- of Possession Of methamphetamine With Intent To Distribute, and Possession Of Drug Paraphernalia, because he did, in fact, possess -- knowingly and intentionally possess methamphetamine, and a whole bunch of methamphetamine (Indicated) with the intent to distribute. And along with that methamphetamine, as there always is, ah, there's drug paraphernalia. And so we're gonna ask you to convict him of these two crimes.

Now I'm gonna sit down. Mr. Slavens is gonna have a chance to get up and address you for a little bit. Of course, the burden, as I told you, is mine. And so what that means is after he's done, I'll have a chance to get up and talk a

little bit more. Maybe rebut anything that he may say or that he may bring up a point that I need to address in my closing. Ah, that's how the system works. The prosecution gets a chance to rebut what the defense says, because we have the burden of proof. And so I appreciate your time and, ah, I'll say a little bit more when Mr. Slavens is done.

Thank you.

THE COURT: Thank you, Mr. Garrett.

Mr. Slavens.

MR. SLAVENS: Thank you, Your Honor.

DEFENSE CLOSING ARGUMENT

BY MR. SLAVENS: This turns, doesn't it (Indicated)?

THE COURT: Yeah. But it's nailed -- it's hooked to the floor cords, so you can't --

MR. SLAVENS: Except -- except for I've read it.

THE COURT: Okay.

MR. SLAVENS: All right.

Ah, on -- on behalf of Bob, I'd like to, ah, thank you folks for taking the time out of your day today to come up and listen to the evidence that's been presented today.

Ah, the Constitution Is a great thing that we have, and you've been a part of that process today, the constitution. And it promises each and every person that, ah -- that when somebody is accused of a certain -- of certain crimes and offenses, they have the right to confront their

witnesses and cross examine the witnesses the State presents. They have a right to call witnesses on their own behalf and have somebody from their peers come hear the evidence to see if they, ah, can reach a -- a verdict, ah, between them -- amongst themselves as to whether or not the State has met its burden of proof proven beyond a reasonable doubt, and we appreciate you taking that time and doing that.

I -- I have noticed you. You've been very attentive ah, listeners to the evidence that's been presented. I think you will, ah, take this charge that you've, ah, entered into today seriously and -- and review the evidence and see if the State's met its burden.

As counsel's indicated to you, this is the only time I get to talk to you about the evidence and the application of the evidence to the law. He'll be able to get up and talk to you again. And then I won't be able to say, "Well, but wait," you know. "Do you remember this? Or do you remember that?" I won't be able to say that again. So I'm gonna ask you to do that on my behalf, if you would. Cause, ah, when -- when, ah, counsel does, ah, dispute or challenge, ah, the positions that we're taking in this case, I ask you to say, "Well what would be the defense response to that and -- and should we make that application, ah, on the rebuttal to what Mr. Garrett said?" Ah, because I won't have that opportunity to do that again.

I think it's important, ah, to understand the law

and how to interpret the law in order to come to a fair verdict in this. And -- and the very initial thing that the Judge told you about it's important that you not be biased, ah, by the fact that, ah, Mr., ah -- or that Bob has been arrested or charged. There's absolutely no -- no bias because of that fact. It -- it -- because of the presumption of innocence, because of the burden of proof, you can't -- you can't use that against him or to use that as any weight on what the verdict should be is the fact that he's been arrested and charged.

Ah, it's got to be completely based upon the evidence that's been, ah, presented today. It can't be based upon sentiment, guesswork, passion, prejudice, any of those things. It has -- or, you know, some, ah, negative feelings you may have about drug use, in particular, or the fact that you think there was people that are getting away with it or anything. None of those things can play a factor on what, ah, verdict that you folks enter. It has to be based upon the evidence and based upon whether or not you feel the State has met its burden of proof.

Each of you are individuals, and -- and we are entitled to that individual opinion. Now I think it's important. Like one of the instructions said that you don't get hooked on to an opinion so much that just by the fact that you're arguing makes you state it just because you're arguing

about that fact. But you are each individuals and you're each entitled to an opinion in this process of coming to a verdict.

Jury, ah, Instruction No. 7 talks about the presumption of innocence and the presum- -- ah -- and I think it's important for you to keep that in -- in mind. When we come here today, when we started this thing, when you start deliberating, he is innocent. And you have to re- -- review the evidence and see if the State has taken, ah -- taken it out of that -- the posture of being presumed innocent and it was established that by, ah, beyond a reasonable doubt.

Now, I think this is important to look at the, ah, jury -- the element offenses that are found in 10 and 11, and look at those closely. I'm only gonna go through, ah -- basically go through Instruction No. 10, because I think that's the more serious offense and I think it's important to look at those things.

Ah did the defendant act knowingly and intentionally? I think you need to look at that and see whether there's any evidence to establish that beyond a reasonable doubt. Because like Mr. Garrett has indicated to you, each -- each one of these elements -- every -- every aspect of these elements have to be established beyond a reasonable doubt. Are you convinced, beyond a reasonable doubt, the defendant acted knowingly and intentionally?

The second element as to that said "Did the

defendant possess controlled substance meth?" Did he possess it? Is there any proof that establishes beyond a reasonable doubt that he knowingly and intentionally possessed meth?

Ah, and did he do that possession with the intent to distribute? As -- has the State presented any evidence that indicated that Mr. Sherry intended to distribute the drugs?

And did the intent to possess and distribute occur on or about June 25th, 2004, and did it occur in Iron County?

The same thing is true with, ah, the paraphernalia. Ah, was there paraphernalia there that meets the elements, ah, going through those elements as I have. Because if you remember, each of those elements have to be established beyond a reasonable doubt. Was there intent to distribute? Was there intent to possess? Was there intent to possess and distribute on June 25th in Iron County? You have to go through each one of those elements to come to a determination of whether or not the State has met its burden.

Jury Instruction No. 13 talks about showing a connection. It's a constructive, ah, possession. Jury instruction shows that the State has the burden of establishing a connection between the drugs and the attempt to distribute and this defendant. I think it's important that you keep that in mind when you are talking about this.

I do want to talk a little bit about expert, because

there was some expert testimony that was presented. And, ah, I'm gonna get into a little bit about fingerprints. But it's my opinion that, ah, the expert opinion doesn't really add any significance to your deliberation, because if you recall, this expert -- the same person that's offering this expert opinion is also the one that said, "Well, he was guilty. We found --" -- you know, "We found the drugs in his truck. He's guilty." And didn't do anything else to find anything. So I -- I think the fact that he branded, ah, Mr. Sherry guilty, before doin' any sort of analysis, before doin' any sort of tests on the -- on the drugs, before -- without doing any fingerprint analysis, any of that type of stuff, he branded him guilty. And so I think any expert opinion, in regards to that is -- and if you look at the instructions, I think those are the very factors that you need to weigh in determining whether or not you give this expert any weight in -- in the opinion.

So I don't think the fact that he gave -- any expert should play any part in your deliberations, because he -- he found -- he found him guilty when he found him in the truck with the drug -- or the drugs in the same truck that he was driving. And I don't think that was a fair assessment.

Let's -- now keeping those facts in mind, let's go a little -- or keeping that law in mind, let's go over a little bit of the facts. I think the history of the vehicle -- of the vehicle is important in determining whether or not the

State's met its burden. If we remember, ah, there was -- there was a time when, ah, Mr. Sherry purchased the vehicle. I don't think that's -- that's not disputed. It's never put in his name, obviously. But I don't think we're disputing or there's been any dispute to the fact that he owned the vehicle.

However, it hadn't been licensed. It hadn't had any insurance since 1999. And you heard the testimony that was presented by, ah, Scott. It hadn't ran. It hadn't ran for years. It was a -- basically, ah, a vacated vehicle that wasn't running. And it only ran for a -- a few hours before the stop was made. It sat, ah, somewhere for a period -- for a long period of time. It hadn't been functioning since 1999. I think that's a fair assumption to make. And for at least a period of time, it was in the parking lot, ah, in -- Agrinautics parking lot.

There was no door key to it. There was no way to lock the vehicle up. Ah, all -- all that they had was an ignition key. This was a 1980 something. I don't know what the testimony was of the vehicle. A Chevy pickup. So it -- it was an older pickup. Ah, needed a lot of work. And I think around town we've seen these vehicles parked all over the place. And you know -- I think in your own mind you have a -- a -- a memory of that type of vehicle and the type of situation.

As we get closer to the time period of when this happened, ah, they worked on it for a period of time. Changed -- took the engine out over in the parking lot. And that took about a two-week process. And then just the night before, they brought it over, put the new engine in. The next morning they had to make some more repairs to it. Fine tune the carburetor. Get the breaks workin'. And then he drove it. And within a very short period of time, ah, he was picked up. So we went from a vehicle that was not running, it was not functioning, to, ah -- to the stop. So there's not a lot of period of time that was in Mr., ah, Sherry's control. And I don't think you can come to the conclusion it was ever in his exclusive control.

And I think that's where Jury Instruction No. 9 comes in play. And I want to spend a little bit more time with Instruction No. 9. In fact, I'm gonna read verbatim first paragraph of that: "If the evidence in this case is susceptible of two constructions or interpretations, each of which appears to you to be reasonable and one of which points to the guilt of the defendant while the other points to his innocence, it is your duty under the law to adopt that interpretation which will admit to the defendant's innocence and reject that which points to his guilt."

And that's part of the reasonable doubt Jury Instruction. Is there a reasonable doubt? If there's another

reasonable explanation of the facts, you have to expect -- accept that reasonable explanation and find the -- find that the State has not met its burden of proof.

Now, maybe you'd point well, we think it probably happened this way, but we could see how it may happened this other way. To me that's reasonable doubt. So it's not a balancing thing. Okay, we're gonna -- this one weighs more this more, so we're gonna go with this one (Indicated). It's not that. It's the question is is there reasonable doubt?

Now there's only -- I guess it can boil down to two -- two interpretations. One, he knew about it, or he didn't know about it. I mean that's -- that's the two choices. There's no other options. He either knew about it being there or he didn't know about it.

And the question -- I think the question or way to analyze that is is there any evidence that establishes that he knew about that in there? And perhaps maybe -- maybe a way to look at it would be, ah, cause it's only very difficult to prove the negative. I mean, for example, if, ah -- if we went out into, ah, the parking lot or you just went and bought a brand new car and somebody looked inside this -- this compartment that's behind the door panel and found some drugs, how would you be able to prove that you didn't put it there? You just barely picked up the car. You -- you maybe bought it last week, but it's been having some repair, and you -- and

you just go and pick it up. How do you prove that you didn't put those drugs there?

Well, I think the very first thing a person would say is, "Check it for fingerprints. You're gonna find out my fingerprints aren't on there." And that's a normal reaction. That would sew it up. If you checked that the -- and the testimony was the -- the surfaces, you could find fingerprints.

The scales. That was a surface that is susceptible to fingerprints. The baggies, those are surfaces that are susceptible to fingerprints. So all they would have had to have done to eliminate the possibility that Bob didn't know about it is just see if his fingerprints are on it, because how could he say, "I didn't know about it?" How could any person, when something is discovered in there, ah, dispute the fact that there's fingerprints on there? So that would have been an easy way to completely get rid of that reasonable interpretation of the facts.

Another would -- way would be to show that that's -- that person had exclusive control of that area. If -- if it was established that Bob was the only person that had access to that cubbyhole, ah, where the drugs were found, then -- then -- then they would be reasonable to say he didn't know about it. But there hasn't been any proof that he had exclusive control of it.

It was in the parking lot forever. It wouldn't lock. It was in this shop being repaired forever with workers comin' and going. So Mr. Sherry has not had exclusive control of that area. There's lots of people who had control of that area.

And when we talked about the value of this -- these drugs, ah, I mean why would a person, ah -- I mean that goes both ways. Why would a person carry that much drugs around or that much money around and not be able to lock it up? It's not in distribution form. I mean it's not already in the little bags. There's no indication that it was being put into little bags or that he was going to distribute. So why would you carry it in a vehicle that you can't even lock up? That doesn't make sense either. Or at least it raises to the level of reasonable doubt.

So the value of the drugs, it doesn't prove one way or another, or it doesn't conclusively show either way as to whether or not he had knowledge of it being in there.

Ah, where it was located doesn't tell us whether he knew. It was back behind there. Ah, the officer, ah, testified that there's no way you could have seen -- just by looking at that hole in the panel, would you have seen the bag? You had to reach in before you -- you could find it. Well, who's gonna reach inside a cubbyhole? How many times have you got in a car that didn't did have a speaker thing and

you reached in there to see if there was anything back there? Nobody does that. It could be -- it could have been there for a long period of time before somebody had reached back there. Maybe until somebody got arrested and the -- and the vehicle was searched.

It might have been the only time that somebody would have reached in there. Or a time to change the speakers or put speakers in there.

Ah, and the fingerprints, to me, is a big issue. That's -- that's the thing that could have shown guilt or innocence. It could go both ways. It could have shown Bob's fingerprints on it. Then it would be very difficult, if not impossible, to then say, "Well, I didn't -- I don't know how my fingerprints got there. But they're there and I -- I had no knowledge of it."

It may have been able to establish that maybe somebody else that had access to the vehicle's fingerprints on it and then, ah -- and then that -- that we could have pursued that angle to see if that person had control or could exercise control over the vehicle. But when you have a situation like we have here when Bob is not the only one that -- that the State has not established in any manner exclusive control in Bob's -- in Bob's favor against Bob, and the fact that we don't have any fingerprints to prove or establish that he touched this or ever had control of it, I don't think the

State has met its burden of proof beyond a reasonable doubt that he's guilty of what they've charged him with.

So for this reason, I think as you go through each of the elements that we went through before, you're gonna find that the State has not met its burden, that there are questions in your mind about whether or not, ah, Bob had exclusive control of it, and that he possessed it with the intent to distribute it in Iron County on that date.

I also -- and I remind you again that, ah, Mr. Garrett's gonna be able to counter some of the things. I invite you to please say, "What would -- what would Mr. Slavens' response be to that counterpoint?" And then come to your conclusion as you go and deliberate.

Again, I appreciate your time and your efforts in this matter. Thank you.

THE COURT: Thank you, Mr. Slavens. Mr. Garrett, you're final remarks.

MR. GARRETT: Thank you.

PLAINTIFF'S FINAL CLOSING ARGUMENT

BY MR. GARRETT: One of the jury instructions, ah, directs you to not consider the possible penalty. Mr. Slavens indicated that Instruction 10 has a more severe penalty than Instruction 11. In other words, the Unlawful Possession Of Meth With Intent To Distribute is more severe penalty than would be Possession Of Drug Paraphernalia. It's your job and

instruction is you're not to consider the possible penalty. You're to apply the facts to the law and --

MR. SLAVENS: Your Honor, I'm gonna have to take exception to that, cause I think what I said was it was a more serious charge. I didn't say anything about penalties.

THE COURT: Sustained. But that is what you said. But I don't know that that changes the argument.

MR. GARRETT: Yes. A more serious charge.

THE COURT: Correct.

MR. GARRETT: Ah, but you're not to consider it. If -- if you find that the State has met its elements as outlined in Instruction 10, then, ah, you're to convict, regardless of the penalty. Okay?

Ah, constructive possession. There's a -- there's a difference between constructive possession and actual possession. Let me give you an example. If two people are -- are in a vehicle and they're driving down the road and they're stopped, the car is stopped, ah, and there's drugs in the vehicle, okay? Ah, it may be that they -- they belong to the driver. Okay?

The question is did the passenger also constructively possess? They may not be his drugs. But they'd be possessed them. Did he have -- did he have the intent to, ah, to possess them? The ability to possess them? Were they within reach? Did he have the intent to exercise

control or dominion over the drugs?

Ah, i think it's a case of actual possession. Not constructive possession. I think he possessed them. They're his. They're nobody else's.

We are not saying that they belong to somebody else, but he may have had the intent to exercise control or dominion over them. We're saying that -- that they're his drugs and that he posted them -- he actually posted them. Not constructively.

Ah, Mr. Slavens talked about, ah, Commander Millett's testimony as an expert and how you should disregard that because he had him pegged guilty from the start. Well, I'd remind you that this actually is Agent Gower's case. He's the one take arrested the defendant. Captain Millett came in after and looked at the evidence and made some conclusions, based upon his training and experience. But he didn't -- he didn't actually make the arrest. And this wasn't his -- his investigative case.

He reviewed the evidence and made some conclusions in expert today, which I think were very helpful. One thing that he talked about was the evidence, ah, being fresh. And you've heard more testimony from Agent Gower about how there wasn't any dust on the evidence -- on the bag. He talked about that, suggesting that it had been taken in and out.

MR. SLAVENS: Your Honor, this is -- I object to

this as not being rebuttal, and I think it's also saying testimony that's not in evidence.

THE COURT: Overruled.

MR. GARRETT: So, you know, if -- if the defense is that the drugs were there when he bought the vehicle, I think that that's not reasonable, given the condition of the bag, the fact that there wasn't any dust, rust, or other dirt or items on the bag. I think it -- it had been placed there recently and had been used and taken in and out.

Ah, there was some testimony about there not being a -- a key to open the truck. You may or may not find that testimony to be credible. But even -- let's assume that it is credible and there wasn't a key. I think that's the reason why the drugs are hidden in the secret compartment, you know, so they're not out open to the public view. So if somebody walks by, they don't see the $5,000 or equivalent of $5,000 sitting on the -- in the cab of the vehicle. Nice little place to hide the drugs right there (Indicated).

And Instruction No. 9 talks about -- he read this to you. It talks about if there's two reasonable constructions, then you're to adopt the one that allows his innocence and reject the other. Well, I don't think there's two reasonable constructions here. I've only heard one. Like I told you, I don't give you evidence. Mr. Slavens doesn't give you evidence. The evidence comes from the witnesses. The

evidence was that we found drugs in the defendant's vehicle and that it was his vehicle.

What evidence did you get, other than that, to suggest that the drugs weren't his?

Ah, there was no -- no evidence put before you.

The witness that testified for the defense, he didn't -- did he give you anything?

MR. SLAVENS: Your Honor, I'm gonna object to this because it's attempting to shift the burden, and the burden never shifts to the defendant to produce any evidence.

THE COURT: I disagree with that comment and I will overrule the objection. However, I will instruct the jury that the burden always remains with the State to prove the defendant guilty beyond a reasonable doubt. Before any conviction occurs, the defendant never has the responsibility to prove his innocence.

Go ahead with your argument.

MR. GARRETT: Thank you.

Well the argument was is I don't see two stories before you. I think if there had been some evidence presented that -- that somebody else had left the drugs in the vehicle, then you might have another -- you might have a defense. You might have another story to consider. But the evidence that you have before you is the drugs were found in his vehicle. He was driving the vehicle. That's it. There was nothing

else for you to consider. And so I don't think there is two reasonable constructions. I think there's one.

Fingerprints. I just want to touch on that again briefly. Do you think we wouldn't be here? Let's assume, for argument's sake, that they had found some fingerprints on this evidence. Do you think we wouldn't be here today? Or might we be here and might the defense be yeah, "Well, yeah, his fingerprints on there. Ah, but those -- those weren't his. They were his buddies, you know." Or "Yeah, he -- he may have had this in his house and touched this scale. But he -- he didn't have it together with the drugs, and the drugs weren't his." Would that be where we're at?

I submit that we'd till be here today. Even if we had a fingerprint, the arguments of the defense might be "These were changed." It might be a little different. But I think we'd still be here.

Ah, he made a statement that nobody reaches into a cubbyhole. Ah, again, it's a great place to hide the drugs, if you want to keep it out of sight. Especially if you're -- you know, if you're gonna get pulled over by a police officer. Ah, you know, you hope that he comes up next to the window to talk to you and he's not gonna see it from that vantage point (Indicated).

Sometimes juries get -- they get caught up in, ah, suppression issues and things like that when they get back to

deliberate. I just want to tell you that -- that those issues, ah, have already been resolved in this case. In other words, --

MR. SLAVENS: Now this is -- that's inappropriate.

THE COURT: Sustained. That is inappropriate. There's no evidence in the record regarding that the jury can consider.

MR. GARRETT: Okay. My point is that when you get back to deliberate, ah, you're not to consider search and seizure issues or whether or not the search was lawful that was performed by Detective Gower. That your law, as it's contained in those instructions, 1 through 24, that's where you're to find your law and your instructions. And anything outside of that, ah, is not to be considered by -- by the jury, together in your deliberations. That is where your law is contained.

And so if you have questions about anything, you know, regarding this case, as far as the law goes, you'll refer to your jury instruction and there you'll find the answers.

Ah, I appreciate your -- your attendance, ah, here today, the way that you listened to the facts. Ah, I -- I hope that, ah, you'll go back and then you'll take the time to read through the Instructions, ah, apply the law to the facts as you've heard 'em, consider the evidence. And when you're

done, I hope you return a -- or your -- excuse me -- a verdict of guilty, because he did possess methamphetamine. The defendant possessed Methamphetamine with the intent to distribute the same (Indicated). And he also possessed drug paraphernalia in the form of the scales and the baggies (Indicated).

Thank you.

THE COURT: Thank you, Mr. Garrett.

I'll ask the Bailiff to take the oath to take charge of the jury.

CLERK: Do you solemnly swear that you will take charge of this jury and keep them together in the Jury Room, that you will not allow any person to communicate with them during the course of their deliberations nor communicate with them yourself, except to inquire as to whether they've agreed upon a verdict, that you will not communicate to any person the state of their deliberations nor the verdict agreed upon, and that you will return them to the courtroom when directed by the Court, so help you God.

BAILIFF: Yes, mam.

THE COURT: All right.

Ladies and gentlemen, the time has come for you to begin your deliberations. That means you're now free to discuss the case among yourselves.

You'll take with you, into the Jury Room, the Jury

Addendum B

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT IN AND FOR IRON COUNTY, STATE OF UTAH

STATE OF UTAH,	**JURY INSTRUCTIONS**
Plaintiff,	
vs.	**CASE NO.**
ROBERT JAMES SHERRY,	**041500345**
Defendant.	

MEMBERS OF THE JURY:

It is my duty now to begin instructing you concerning the law applicable in this case, and it is your duty as jurors to apply the law as I shall state it to you.

The function of the jury is to try the issues of fact that are raised by the charges in the Information filed by the State of Utah and the defendant's plea of "Not Guilty" to those charges. You should perform that duty uninfluenced by pity for the defendant or by passion or prejudice against him. You must not suffer yourselves to be biased against the defendant because of the fact that he has been arrested or because an Information has been filed against him or because he has been brought before the Court to stand trial. None of these facts is evidence of his guilt, and you are not permitted to infer or to speculate from any or all of them that he is more likely to be guilty than innocent.

INSTRUCTION NO. 2

You are to be governed in this case by the evidence presented to you and the law as I state it to you. You may not consider mere sentiment, guesswork, sympathy, passion, prejudice, public opinion or public feeling in deciding the guilt or innocence of the defendant. Both the State of Utah and the defendant have a right to expect that you, and each of you, will conscientiously, seriously and impartially consider and weigh the evidence and properly apply the law to reach a just verdict, regardless of what the consequences of that verdict may be.

The verdict must express the individual opinion of each juror.

INSTRUCTION NO. 3

You are the exclusive judges of the facts, and the effect, value and weight of the evidence produced in this case. You may consider any evidence which is admitted by me. You may not consider evidence which is excluded or which is admitted and later ordered by me to be stricken. Likewise, you may not consider as evidence statements of the attorneys, or any hint or intimation of the truth or falsity of any fact or evidence made by the attorneys.

Statements, arguments and remarks of the attorneys are intended to help you understand the evidence and apply the law, but such statements are not evidence. You should disregard any statement of an attorney which has no basis in the evidence coming from witnesses, documents or stipulations received in evidence in this case.

Of course, if the attorneys stipulate to any fact or facts and that stipulation is accepted by me, you may regard the stipulated fact or facts as conclusively proven and shown without additional evidence.

Addendum C

IN THE FIFTH JUDICIAL DISTRICT PAROWAN COURT

IN AND FOR IRON COUNTY, STATE OF UTAH

ORIGINAL

STATE OF UTAH, Plaintiff, VS. ROBERT JAMES SHERRY, Defendant,	CASE NO. 041500345 JURY TRIAL

BEFORE THE HONORABLE J. PHILIP EVES

FIFTH JUDICIAL DISTRICT PAROWAN COURT

IRON COUNTY COUNTY COURTHOUSE

PAROWAN, UTAH 84761

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MARCH 3, 2005

REPORTED BY: Joseph M. Liddell, CSR, RPR

20050522-SC

Instructions, and you may each take your copy, ah, as well as the evidence that's been received as exhibits here and the verdict form. Would you follow the Bailiff into the jury room.

(Jury left courtroom.)

PROCEEDINGS CONTINUED OUTSIDE PRESENCE OF JURY

THE COURT: The jury has now left the room. The door is closed. We'll be in recess until --

DEFENSE MOTION FOR MISTRIAL

BY MR. SLAVENS: Your Honor, I'd like to make a motion.

THE COURT: Go ahead.

MR. SLAVENS: You know, I know Mr. Garrett very well. I think he's -- he's a good man, an honorable man. But I am just shocked that he would tell the jury that the discretion areas -- issues have already been taken -- taken care of. I have no idea why he would say something like that to a jury. I think that's prosecutorial misconduct to say that. I don't think there's any legitimate reason to say that. It has nothing to do with any defense that we presented and does nothing more than try and tell the jury that there's evidence out there that he wasn't able to present.

THE COURT: And so what's your motion?

MR. SLAVENS: Well, I think the charges should be dismissed because of it, and at the very least, a mistrial.

THE COURT: You're moving for a mistrial.

MR. SLAVENS: Well, yes.

THE COURT: On the basis of prosecutorial misconduct.

MR. SLAVENS: Yes. I think -- I don't know what the law is, as far as, ah, what happens after the jury has been impaneled and read the Jury Instructions, whether or not double jeopardy forbids further --

THE COURT: Well jeopardy attaches when they were sworn this morning at the beginning of the proceedings.

MR. SLAVENS: Yes. So I don't know whether what I'm asking for is a mistrial or that it can't be further prosecuted because of double jeopardy. But I -- I think that's a way. And I -- I need further research to come to that determination. But I think that this jury has been tainted because of that statement.

THE COURT: Now tell me what the prejudice is to your client.

MR. SLAVENS: Well, he -- he said to -- he said to the jury that, ah, the suppression issues have already been taken care of.

THE COURT: Which is true.

MR. SLAVENS: Well, the fact there was nothing suppressed in this case.

THE COURT: Oh, yes there was.

MR. SLAVENS: In this case?

THE COURT: Yes.

MR. SLAVENS: What.

THE COURT: Isn't this the one where we suppressed what was found in his house?

MR. SLAVENS: Yeah. But that's a whole -- those are whole different charges, but nothing to do with the issues regarding these charges. But what's --

THE COURT: You're saying that I didn't suppress the evidence found in the car.

MR. SLAVENS: Right.

THE COURT: Was there a motion to suppress them?

MR. SLAVENS: Yes.

THE COURT: I ruled on it? The issues in that -- in that regard have been taken care of. So it is true.

MR. SLAVENS: Well, okay. That -- that -- I guess it would be a true statement. But what -- what's the purpose of having a suppression hearing if we tell the jury, "Well, there were suppression issues," and they don't know that there wasn't anything suppressed.

THE COURT: Well, I sustained your objection. And I -- I instructed -- I, ah, ordered that he not continue with that line of questioning. My question is how are you prejudiced by that? It is a true statement.

MR. SLAVENS: Because I -- as you know, from the

other case, we can't go into inquire as to what they're deliberating.

THE COURT: Um-hm.

MR. SLAVENS: Now they start deliberating, we can never use any deliberation in there. And so we have this statement out there that the discretion issues have already been taken up. They don't know that there was no evidence suppressed. So if they -- so they -- they -- there's a possibility that they're in there saying, "Well dang. We don't -- we didn't even get all the evidence."

THE COURT: Okay. Do you have any authority that supports the position that mentioning the fact that there was a suppression issue that --

MR. GARRETT: Judge -- Judge, I didn't mention there was a suppression hearing. I said sometimes juries get back and they worry about searches, referring to the search of the vehicle. I said that --

THE COURT: You did make the statement that the suppression issues had been taken care of already.

MR. GARRETT: Any suppression issues would have been taken care of at this point --

THE COURT: Yeah.

MR. GARRETT: -- and that you're not to consider -- what I didn't want them to do, goin' back there and saying, Hey, he searched the vehicle," you know, "why did he search

it?" That's the purpose of -- of me saying what I said.

THE COURT: Do you realize that you were presenting evidence to the jury that hasn't been presented?

MR. GARRETT: Well, he presented evidence to the jury that hadn't been presented.

THE COURT: Which was? Are you making a motion.

MR. GARRETT: No. I'm not making a motion.

THE COURT: Ha-ha ha. Okay. All right.

MR. GARRETT: I'm not just saying that. I just didn't want them to get back in there and say that Tony Gower's search was illegal and therefore -- you know, those things --

THE COURT: Okay.

MR. GARRETT: They've been instructed on the law.

THE COURT: They have.

MR. SLAVENS: And I think that would --

THE COURT: But right now back to my question. Do you have any legal authority to support your motion for a mistrial?

MR. SLAVENS: Well, other than I -- I don't think there's any dispute that it's improper to tell, ah, the jury about any suppression hearing, about exercising the right to remain silent or any of those things -- anything --

THE COURT: Well, but you -- let's talk about just the issue here. Where is there any case law that says that

telling them that there's been a suppression issue dealt with is prosecutorial misconduct rising to the level that requires a mistrial? Have you got any authority to that effect?

MR. SLAVENS: I -- I haven't researched it.

THE COURT: I know there's authority on the question of whether you comment on the defendant's right to remain silent. That clearly constitutes prosecutorial misconduct.

MR. SLAVENS: Well, I think that's -- yean. And that's the only -- that's the only case law I know of. And I think by, you know, analyzing it, I think is the same thing.

THE COURT: Okay.

Now, Mr. Garrett, do you want to respond on the subject of any legal authority?

MR. GARRETT: Well, I'm not aware of any legal authority, Your Honor. A, like I said, I've seen it before where juries go back there and then they want to -- they want to talk about search and seizure. I'm merely stating that that's not -- that's inappropriate at this point. Your law is in the Jury Instructions. Any issues regarding that would have been resolved at this point. And that -- that was my intent and my purpose of making that statement.

THE COURT: All right.

Do you have any final remarks on the subject?

MR. SLAVENS: Well, yeah. I -- I question that because there wasn't any evidence or argument or anything

questioning the search to the jury. And I -- I've done a lot of jury trials and I've never seen a jury go back there and try and deliberate -- you know, deliberate whether or not the search was legal or not. I mean that -- that just -- I'm just completely confounded why, ah, the prosecutor would say that.

THE COURT: Okay.

MR. SLAVENS: I think the only -- the only -- the only reason I could see is to get them to thinking that there might have been some evidence that they weren't able to hear.

THE COURT: Well, all right.

I didn't hear anything in the comment that would have inferred to the jury that there was other evidence that they weren't told about. Ah, so I don't view that as the purpose of the statement. On the other hand. I don't think that's appropriate for the prosecutor for tell the jury about prior proceedings that aren't in the -- aren't in the evidence. Ah, so I find that I think that it was inappropriate to make that comment that those issues had already been dealt with. On the other hand, I don't think it rises to the level that requires a mistrial, so I'm gonna deny the motion for a mistrial.

Anything else we need to deal with at that point?

MR. GARRETT: No, Your Honor.

THE COURT: We'll be in recess until the jury has reached a verdict or until further order of the Court.